Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

AUSTIN INDEPENDENT SCHOOL DISTRICT
AND KENT EWING,

Petitioners,

v.

TED MEYER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a high school principal could hold an objectively reasonable belief that his attempt to control perceived gang activity by ordering the immediate removal from school of nine students and arranging a post- rather than pre-discipline conference would not violate the students' clearly established Fourteenth Amendment procedural due process rights, so as to entitle the principal to qualified immunity.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Ted Meyer as Next of Friend for Carolyn Preciado, A Minor; Rosemary Meyer, Individually and as Next Friend for Carolyn Preciado, A Minor; Harold Robbins, Individually and as Next Friend for Linda Rosales, now known as Linda Quiroz, A Minor; Linda Robbins, Individually and as Next Friend for Linda Rosales, now known as Linda Quiroz, A Minor; Pedro R. Aguirre, Individually and as Next Friend for Angelica Aguirre, A Minor; Sylvia Martinez, Individually and as Next Friend for Aglae Martinez, A Minor; Jesse Martinez, Individually and as Next Friend for Aglae Martinez, A Minor; Herminia Larios, Parent of Sarah Ramirez; and Sarah Ramirez were parties before the United States Court of Appeals for the Fifth Circuit.

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STATEMENT OF JURISDICTION

The Fifth Circuit's opinion was filed on November 16, 1998. The Fifth Circuit denied a timely filed petition for rehearing on February 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

> life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Plaintiffs' Fourteenth Amendment procedural due process claim was brought pursuant to 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Kent Ewing is the principal at Bowie High School, which is part of the Austin Independent School District ("AISD") in Austin, Texas. More than 200 gangs have been identified by the Austin Police Department as operating in the Austin area, and gang-related violence and crime is a problem that continues to grow and linger in

Austin. R. 399-400.[1] The Austin Police Department's Gang Unit works closely with AISD's police officers, administrators, faculty, and parent-teacher organizations on gang issues. *Id.* In the school years prior to August 26, 1994, Bowie High School students had "tagged" school buildings with gang signs; other students had pretended to be part of gangs; and administrators had mediated conflicts related to gang activities or want-to-be gang activities. *See* App. D at 23. At the beginning of each school year, Bowie High Administrators had noticed that some students would present the appearance of being associated with a gang. *Id.;* R. 341-42. Bowie High School's dress code stated that

> The school will become involved only if the student's appearance conflicts with the safety, health, behavior or learning environment within the school. Vulgar and obscene clothing is not permitted. Clothing worn in any manner other than for which it was designed is not permitted.

App. D at 27.

August 26, 1994, was the first Friday of the first week of school for AISD's 1994-95 school year. That morning, nine female students wearing maroon colored clothing gathered at the front of the school as they arrived for class. The group entered the campus and walked toward the school building. At least two other students who had seen the nine girls warned school administrators that

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[1] References to the Fifth Circuit record, although not now before this Court, are included and designated "R. ___."

there was going to be a fight or disruption. Principal Ewing was approached by a student who told him there was going to be a disruption. App. D at 22. Assistant Principal Jorge Rodriguez was in a different part of the campus and was told that there was going to be a fight near the location where the group was entering. App. E at 29. Rodriguez ran to the area, saw the nine members of the group wearing similarly colored clothing near the main entrance to the school, heard them cursing at other students, observed what he believed to be gang identification on some of the shirts, and saw what he perceived to be hand gestures of gang signs. App. E at 29-32. Rodriguez placed himself between the group of nine students and the passing students and radioed Principal Ewing for assistance. App. E at 31. While doing so, he overheard a passing student refer to the group as a gang. R. 329. Plaintiff Linda Rosales testified in her deposition that the passing students were cursing at Linda and her eight friends and making comments about their being a gang. R. 412-14. Rodriguez detained the group, told them to sit down in the courtyard, and instructed the passing students to proceed to class.

Principal Ewing arrived at the scene within seconds after Rodriguez radioed him. App. E at 31. Rodriguez informed Principal Ewing that there was a disturbance, that some of the students were using profanity, and that the similarly colored clothing and the lettering on some of the t-shirts led him to believe the disturbance might be gang-related. App. E at 31-32. Rodriguez also told Principal Ewing that he was afraid that a fight was going to occur because one of the students in the group was very expressive in her body language and was hurling very

severe profanity at students. App. E at 32. The unchallenged summary judgment evidence from Ray Brown, an officer with the Austin Police Department's Gang Unit who works with schools in the Austin Area, established that both the maroon colors worn by the students and the lettering ("Q-VO" and "13") on a couple of their shirts are symbols used by a youth gang known as the "outlawz" who are associated with the "EGV's" in the Austin area. R. 401.

Principal Ewing asked the group about their similarly colored clothing and the symbols added to some of their clothing, which he believed were gang symbols.[2] He gave them the option to change into a shirt provided by the school or to turn the shirts with gang lettering inside-out, but the girls refused. App. D at 24. Plaintiff Sarah Ramirez testified in her affidavit that one of the girls in her group began to use profanity and told Mr. Ewing: "We can wear what we want. Are you going to buy us different clothes?" R. 273.[3] The students were told to sit down and be quiet. Mr. Ewing informed them that staying at "Bowie was not an option" if they insisted on wearing the clothing that he perceived had caused a disruption, and he asked some of the girls which school they would want to attend. Plaintiff Linda Rosales, who

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[2] The Fifth Circuit characterized these inquiries as "apparently rhetorical questions." App. A at 4.

[3] The student who said this was also the one using the most profanity, and she later called an assistant principal a "nigger." R. 417. She was arrested by a police officer who happened to be on campus on other business, for continuing to cause a disturbance after she was taken to the principal's office. *See* App. E at 33; R. 325. She is not one of the plaintiffs in this case.

was dressed in maroon from head-to-toe, R. 469, and whose t-shirt was one of the ones containing lettering believed by administrators to be gang-related, testified in her deposition that she stood, turned her back to Principal Ewing, and addressed the group as if he were not there. R. 422, 426. She also testified in her deposition that she called Principal Ewing a liar and told the group that he could not make them transfer to a different school. R. 421-22.

At least two of the students used profanity in Principal Ewing's presence, and one of them called an assistant principal a "nigger." App. E at 36; R. 417. Principal Ewing asked a journalism teacher to take photographs of the students' clothing. Principal Ewing perceived a need to diffuse the situation at hand and eliminate the possibility of further disruptions or fights later that day. App. D at 26-28. He instructed his assistant principals to remove the nine students from school on an emergency basis, to call their parents to come pick them up, and to schedule conferences with the students and their parents upon the students' re-entry to school in three days. App. D at 25-28.

The assistant principals called the students' parents and informed them that they needed to pick up their children as they were being removed from school for a disruption that was believed to be gang-related. When the parents arrived, each parent and child met with an assistant principal concerning the incident. Notwithstanding the parents' and students' protestations, the

students were removed from school for three days.[4] The students were given re-entry conferences with their parents when they returned to school.

Five of the nine students filed a petition in state court alleging that their rights under the Texas and United States Constitutions had been violated by Austin Independent School District and administrators at Bowie. The

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[4] The students have at times characterized the emergency removal as a suspension or expulsion in their various pleadings. The Fifth Circuit appears to have generically characterized the removal as a "suspension," *see, e.g.*, App. A at 2, without holding that it was not an emergency removal and without addressing whether there existed an emergency or a perceived emergency. Throughout the litigation, Principal Ewing has contended that the students got the process they were due regardless of whether their three-day exclusion was an emergency removal or a suspension. The sole issue in this Petition – qualified immunity – does not turn on the merits of the students' procedural due process claims and does not require resolution of any alleged disputes over the proper label for the discipline that occurred (i.e., whether or not there was, in actuality, an emergency situation and an emergency removal as opposed to a suspension). Rather, the question presented is whether Principal Ewing is entitled to qualified immunity because on the morning of August 26, 1994 he held a reasonable, even if mistaken, belief that his attempt to control perceived gang activity by immediately excluding the students from school for three days, without a prior hearing but with provision of post-exclusion conferences, complied with clearly established law. *See Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) ("Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable. . . . "). This analysis is detailed in the Argument, *infra*.

Defendants removed the case to federal district court, which had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a). The parties agreed to proceed before a magistrate judge. In response to Defendants' motion to dismiss and motion for summary judgment, the magistrate judge dismissed all claims except for the students' claim that Principal Kent Ewing, in his individual capacity, violated their right to procedural due process when he ordered their removal from school for three days without providing them an opportunity to tell their side of the story prior to imposing discipline. The magistrate judge then denied Principal Ewing qualified immunity with respect to the students' claim under 42 U.S.C. § 1983 that he violated their Fourteenth Amendment due process rights. Austin Independent School District was kept in the suit solely as a nominal defendant for the purpose of providing any injunctive relief to which the students might be entitled.[5] Principal Ewing filed an interlocutory appeal from the denial of qualified immunity. The Fifth Circuit had jurisdiction over the interlocutory appeal pursuant to 28 U.S.C. § 636(c)(3) and 28 U.S.C. § 1291. *See also Behrens v. Pelletier*, 516 U.S. 299 (1996).

In affirming the district court's denial of qualified immunity, the Fifth Circuit held that the existence of fact issues regarding the students' ability to tell their side of the story *prior* to imposition of discipline, pushed this

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[5] The students sought to have any references to gang-related activity removed from their confidential school disciplinary records.

case beyond the ambit of the court's limited interlocutory jurisdiction and justified the denial of Principal Ewing's qualified immunity defense. App. A at 8-10; App. B. The Fifth Circuit stated: "While he was free to suspend the students *after* hearing their stories, *Goss* [*v. Lopez*, 419 U.S. 565 (1975)] unambiguously required him to allow them to present those stories, and if he did not do so, he violated the students' due process rights." App. A at 10. (emphasis added); *see also id.* at 7 (stating that *Goss* requires a school to provide an opportunity for a student to tell her story "before" suspending the student).[6]

The Fifth Circuit focused on the adequacy of the students' pre-discipline opportunity to tell their stories, as had the students in their pleadings. In a footnote, the Fifth Circuit acknowledged that *Goss* "specified that the hearing should be '*preferably* prior to the suspension,' 419 U.S. at 584, indicating that a hearing subsequent to the suspension might be appropriate." App. A at 9 n.4. The Fifth Circuit did not mention that *Goss* explicitly recognized that a hearing subsequent to suspension is in fact appropriate with respect to "[s]tudents whose presence poses a continuing danger to persons or property or an

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[6] The Fifth Circuit noted the possibility that the students' stories conceivably could be told by the parents or an otherwise "reliable intermediary standing *in loco parentis* to the child." App. A at 8. In this case, however, it concluded that its limited jurisdiction in this interlocutory appeal prevented it from disturbing the district court's finding that there was a fact issue regarding whether the students were allowed to tell their side of the story, "including the parents in the mix." *Id.*

ongoing threat of disrupting the academic process." *Goss*, 419 U.S. at 582. The Fifth Circuit, in the same footnote, distinguished this case from a prior Fifth Circuit decision that upheld the constitutionality of a post-suspension hearing for students who already had left school grounds when the decision to discipline them was made.

In its opinion, the Fifth Circuit did not address, with respect to qualified immunity, the issue of whether an objectively reasonable school administrator could have believed that the students' attire, attitudes, and actions created a situation in which the nine students' presence posed a continuing danger to persons or property or an ongoing threat of disrupting the academic process, such that a pre-removal hearing was not required by clearly established law. The opinion contains no evaluation of the objective reasonableness of Principal Ewing's decision, on the morning of August 26, 1994, to order the three-day removal of the students and instruct the assistant principals to arrange re-entry conferences with the students and their parents.[7] The Fifth Circuit, instead,

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[7] Principal Ewing's involvement in the incident that is the basis of this suit consisted of his interactions with the students in the courtyard and his tri-part decision announced in the courtyard, instructing the assistant principals to: (1) remove the nine girls from school for three days; (2) call the girls' parents to inform them what had occurred and request that the parents come to the school to pick up their children; and (3) schedule conferences with the students and their parents upon the students' re-entry to school in three days. The meetings with parents when they came to pick up their children on the day of the incident all were conducted by the assistant principals. One parent, after meeting with an assistant principal, also spoke with Principal Ewing, who declined to alter the removal. The

analyzed whether the students actually received the process they were due and concluded that the court's limited interlocutory jurisdiction prevented it from resolving fact disputes over whether the students actually told their side of the story.[8]

ARGUMENT

THE COURT SHOULD GRANT THE PETITION BECAUSE THE FIFTH CIRCUIT DEFINED STUDENTS' PROCEDURAL DUE PROCESS RIGHTS IN A MANNER THAT CONFLICTS WITH *GOSS v. LOPEZ*, AND IT CONTRAVENED WELL-ESTABLISHED QUALIFIED IMMUNITY PRINCIPLES BY IMPERMISSIBLY SUBSTITUTING ITS JUDGMENT FOR THAT OF A HIGH SCHOOL PRINCIPAL WITHOUT ANALYZING WHETHER A REASONABLE ADMINISTRATOR ATTEMPTING TO CONTROL PERCEIVED GANG ACTIVITY COULD HAVE BELIEVED AN IMMEDIATE THREE-DAY REMOVAL FOLLOWED BY A RE-ENTRY CONFERENCE WOULD COMPLY WITH CLEARLY ESTABLISHED LAW.

A. Reasons for Granting the Writ

The Fifth Circuit's opinion exposes school officials to lawsuits for money damages and dramatically curtails

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post-removal meetings that Ewing instructed the assistant principals to arrange upon the students' return to school all were conducted by the assistant principals.

[8] The record reflects (and the students' First Amended Complaint alleges) that on the day of the incident, the students and/or their parents denied that the students were in a gang. The record gives no indication of what other story the students wanted to tell, but were not able to tell, either directly or through their parents.

their ability to maintain order in the contemporary educational environment in a manner that is inconsistent with *Goss v. Lopez*, 419 U.S. 565 (1975), and well-established tenets of qualified immunity jurisprudence. This case presents an important federal question regarding both the scope of Fourteenth Amendment procedural due process protections for students and the latitude to be provided administrators making difficult disciplinary decisions as they grapple with the challenge of controlling gang activity in today's schools. The Fifth Circuit's opinion constitutes an alarming erosion of the qualified immunity defense in the education context that merits this Court's consideration. *See Wood v. Strickland*, 420 U.S. 308, 319-20 (1975) ("The imposition of monetary costs for mistakes which were not unreasonable in light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students).[9]

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[9] *Wood* was overruled by *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982), only to the extent *Wood* contemplated that the "good faith" test for qualified immunity contained a subjective component of malice in addition to an objective component of legal reasonableness. *Harlow* was not a school case, and it did not speak to *Wood*'s discussion of the proper relationship between the federal courts and schools. *Harlow* does, however, support *Wood*'s assertion that school officials should be insulated from liability for discretionary decisions that are objectively reasonable. *Harlow*, 457 U.S. at 818.

The Fifth Circuit misapprehended its "limited jurisdiction" on an interlocutory appeal from a denial of qualified immunity and defined students' constitutional rights in a manner that conflicts with *Goss*. Couching the issues on appeal solely in terms of the merits of the students' procedural due process claims, the Fifth Circuit impermissibly circumvented the standard of objective legal reasonableness set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and substituted its own judgment for that of a school administrator, Principal Kent Ewing of Bowie High School in Austin, Texas.

In particular, the Fifth Circuit refused to address the core qualified immunity inquiry of whether a reasonable school official in Principal Ewing's position, in light of the knowledge possessed by Principal Ewing and the circumstances with which he was confronted, could have held a reasonable, even if mistaken, belief that an emergency three-day removal of a group of nine teenagers who were wearing matching colored shirts marked with apparent gang insignia and who were perceived, both by administrators and several students, to be gang-affiliated, would not violate the nine students' clearly established constitutional rights. *See Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987) (requiring consideration of the information the defendant possessed in determining whether "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."). There is nothing about an appellate court's limited interlocutory jurisdiction that prevents it from answering this question. *See Behrens*, 516 U.S. at 313. The Fifth Circuit, however, stated that Principal Ewing would be entitled to qualified immunity only if

he could prove, at trial, that the students were in fact provided an opportunity to tell their side of the story prior to their removal from campus. *See* App. A at 10.

The Fifth Circuit's approach ignored both the margin of error inherent in qualified immunity and the flexibility afforded school administrators under *Goss*, in which this Court determined that pre-deprivation hearings are not required with respect to "[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process." 419 U.S. at 582. The parameters of *Goss* were not, and are not now, clearly established such that no reasonable school administrator could believe that Principal Ewing's response on the morning of August 26, 1994 to what was perceived by both administrators and students to be a gang-related incident did not qualify as the type of situation in which *Goss* permits imposition of discipline without holding a *prior* hearing. The Fifth Circuit's opinion inexplicably makes no mention of the "ongoing threat of disrupti[on]" aspect of *Goss*; nor does it address the objective legal reasonableness of Principal Ewing's perception of the incident as one for which *Goss* instructs that no pre-discipline hearing is required.

The Fifth Circuit's selective reading of *Goss*, combined with its abdication of responsibility to ensure, on an interlocutory appeal from a denial of qualified immunity, that a public official is not subjected to trial for an action that was objectively reasonable in light of clearly established law, opens the floodgates for "federal courts to set aside decisions of school administrators which the

court may view as lacking a basis in wisdom or compassion" and "to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations." *Wood*, 420 U.S. at 326.[10] The Fifth Circuit substituted its judgment for Principal's Ewing's without acknowledging, much less evaluating the reasonableness of, Principal Ewing's perception of an emergency situation consisting of, at worst, an apparent threat of a gang fight, and, at best, an apparent showing of gang affiliation or want-to-be gang affiliation during the first week of school.

B. The Fifth Circuit Abdicated its Role in an Interlocutory Appeal From a Denial of Qualified Immunity and Ignored the Core Protections of the Doctrine

The touchstone for qualified immunity is "objective legal reasonableness." *Harlow*, 457 U.S. at 819. "[G]overnment officials performing discretionary functions

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[10] A disagreement over the propriety of an administrator's construction of school regulations or the parameters of state education code procedures does not, itself, provide a basis for a violation of federal due process guarantees. *See, e.g., Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984); *see also Wood*, 420 U.S. at 326. The Fifth Circuit's criticism in a footnote of Principal Ewing's belief that the nine girls had violated the school's dress code, App. A at 7-8 n.3, is immaterial to the question of whether Principal Ewing held an objectively reasonable belief that the students' presence posed "a continuing danger to persons or property or an ongoing threat of disrupting the academic process" such that his decision to remove them immediately and arrange a re-entry conference complied with clearly established due process rights under *Goss*. 419 U.S. at 582.

generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

Qualified immunity is "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). "*Harlow* and *Mitchell* make clear that the defense is meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such *pretrial* matters as discovery . . . , as [i]nquiries of this kind can be peculiarly disruptive of effective government." *Behrens*, 516 U.S. at 308 (internal quotation marks and citation omitted). Because qualified immunity is designed to protect public officials from the burdens and disruptions of discovery and trial, "a district court's rejection of a defendant's qualified-immunity defense is a 'final decision' subject to immediate appeal under the general appellate jurisdiction statute." *Id.* at 301 (citing *Mitchell*, 472 U.S. 511).

Qualified immunity is severable from the merits because its availability turns not only on the question of whether a violation of a constitutional right actually occurred, but also on whether, notwithstanding a violation, an official in the defendant-official's position could have reasonably, albeit mistakenly, believed that the conduct at issue did not violate clearly established rights of which a reasonable official would have known. *See, e.g.*, *Anderson*, 483 U.S. at 640-41; *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986); *Mitchell*, 472 U.S. at 535; *Wood*, 420 U.S. at 319-22. The analytical distinction between the merits of a constitutional claim and the elements of the qualified

immunity defense should be the primary focus of interlocutory appellate review, since the benefits of the doctrine largely are destroyed if an official is subjected to the burdens of discovery and the distractions of standing trial. *See Behrens*, 516 U.S. at 308. The contours of students' procedural due process rights in the school discipline context were not so clearly defined at the time Principal Ewing ordered the three-day removals that a reasonable school administrator would know that a failure to provide a pre-deprivation hearing for an immediate removal of students in an attempt to control perceived gang activity would violate clearly established law.

The Fifth Circuit's failure to address the abstract legal questions of clearly established law and *Harlow*'s standard of objective legal reasonableness impermissibly constricted the scope of interlocutory appellate jurisdiction and unlawfully divested Principal Ewing of the full protections of qualified immunity, remanding the case for trial despite the lingering presence of qualified immunity issues that should have been resolved by the Fifth Circuit as a matter of law. *See Behrens*, 516 U.S. at 308. Rather than examine the objective legal reasonableness of Principal Ewing's conduct in light of the information he knew, the circumstances with which he was confronted, and the law as clearly established at the time, the Fifth Circuit conflated qualified immunity with the merits of the students' procedural due process claims and then determined that fact disputes *concerning the merits* required a trial. As such, the Fifth Circuit's approach contravened *Harlow v. Fitzgerald*, *Mitchell v. Forsyth*, and *Behrens v. Pelletier*.

The Fifth Circuit circumscribed its analysis on the basis of a misapprehension of the scope of interlocutory jurisdiction, a misapplication of *Harlow*, and a misreading of *Goss*. Furthermore, its second-guessing of the disciplinary action taken by Principal Ewing constitutes an impermissible intrusion into the arena of public school administration.

C. A Reasonable School Administrator Could Have Believed That an Attempt to Control Perceived Gang Activity Through an Emergency Three-Day Removal Followed By a Re-Entry Conference Was Lawful Under *Goss v. Lopez*.

In *Goss v. Lopez*, 419 U.S. 565 (1975), the Court set forth the fundamental parameters for procedural due process in the school discipline context.

> Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. . . .
>
> . . . We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is. . . . Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from

> school. *We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable, as the District Court indicated.*

Id. at 581-83 (emphasis added). In other words, the "general rule" calls for notice and hearing to precede suspension; however, pre-deprivation process is not required when the presence of students "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process." *Id.* at 582. Under those circumstances, a post-removal hearing, "as soon as practicable," comports with due process. *Id.* at 582-83.

The Fifth Circuit's analysis does not address this aspect of *Goss*. Nor, for that matter, does the Fifth Circuit's opinion resolve the issue of whether a reasonable school administrator in Principal Ewing's position, in light of the information possessed by Ewing and the circumstances with which he was confronted on the morning of August 26, 1994, could have reasonably believed that the presence at school of nine girls in matching colored shirts (some of which were marked with apparent gang insignia), hurling profanity at students entering the school for morning classes, prompting at least two students to report a disruption or fight in the courtyard and another to refer to the nine as a gang, "pose[d] a continuing danger to persons or property or an ongoing threat of disrupting the academic process" such that a hearing *prior* to imposition of discipline was

not required under *Goss*. Instead, the Fifth Circuit focused solely on *Goss*'s "general rule" and analyzed the merits of whether the students had been given an opportunity to tell their side of the story before Principal Ewing's pronouncement of their removals. *See* App. A at 10. Such an approach ignores *Goss*' acknowledgment that pre-discipline hearings are not categorically required. 419 U.S. 582-83. Furthermore, even assuming a pre-discipline hearing would in fact be required under the circumstances with which Principal Ewing was presented, that merits-based determination would not be dispositive of the distinct issue of qualified immunity.

The Fifth Circuit's approach ignores the margin of constitutional error inherent in *Harlow*'s objective legal reasonableness standard, which "gives ample room for mistaken judgments" and "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341, 343. Instead of evaluating the objective reasonableness of Ewing's conduct, the Fifth Circuit analyzed the merits of the students' claims under the circumstances as viewed by the court with hindsight. In essence, the Fifth Circuit impermissibly equated the merits of a school suspension procedural due process claim with the qualified immunity defense. In fact, the court's confusion of the merits and the qualified immunity inquiry is evidenced by the closing words of the opinion:

> Of course, Principal Ewing still has a qualified immunity defense available to him at trial. He thus may show that the students, either personally or through their parents, were able to tell their side of the story.

App. A at 10. This statement exhibits two fundamental flaws. First, if Principal Ewing is subjected to full-blown discovery and trial, the primary benefits and protections of the qualified immunity defense already will have been defeated. Second, Principal Ewing need not, as a matter of law, prove that the students "either personally or through their parents, were able to tell their side of the story" – i.e., prevail on the merits – in order to be entitled to qualified immunity. Instead, what is at issue is the objective legal reasonableness of Principal Ewing's actions under the circumstances and in light of clearly established law at the time the actions occurred – an abstract question of law which the Fifth Circuit had not only interlocutory appellate jurisdiction, but a *responsibility*, to answer before remanding for trial on the merits. *See Behrens*, 516 U.S. at 308; *Mitchell*, 472 U.S. at 526. The Fifth Circuit abdicated its role in the qualified immunity scheme.

The Fifth Circuit skirted the issue of *Harlow*'s objective legal reasonableness standard with the following remark:

> The appellants contend in the alternative that the administrators acted as reasonable public officials would and thus are entitled to qualified immunity. Reasonable public officials, however, could not differ on whether allowing the students to tell their side of the story was required.[11]

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[11] This statement refers to "administrators," suggesting that administrators other than Principal Ewing are defendants to this suit. However, the only administrator against whom claims remain is Principal Ewing.

App. A at 9. This comment is technically accurate, but misleading. *Goss* requires that students be given some opportunity to tell their side of the story; *Goss* does not, however, require that the opportunity always be provided *prior* to imposition of discipline. While the Fifth Circuit is correct that in light of *Goss* "reasonable public officials . . . could not differ on whether allowing the students to tell their side of the story was required," it is not the case that reasonable officials could not differ as to *when* and *how* students tell their side of the story. Under *Goss*, there is no bright-line test; instead, *Goss* recognizes that the timing and extent of procedural protections in the school discipline context must remain flexible and context-specific. This concept is reflected in *Goss'* acknowledgment that school administrators may circumscribe the procedural protections typically provided prior to imposing discipline in circumstances where the students' presence constitutes a continuing danger to persons or property or an ongoing threat of disrupting the academic process. *Goss*, 419 U.S. at 582-83.

The Fifth Circuit never addressed the issue of whether a school administrator in Principal Ewing's position could have held an objectively reasonable, even if mistaken, belief that a volatile situation existed that required immediate action. The uncontroverted summary judgment evidence indicated that at the start of the day on Friday, August 26, 1994, Principal Ewing was stopped by a student in the hallway and urged to go to the courtyard. Ewing also was contacted over his radio by Assistant Principal Rodriguez, who asked him to come right away to the courtyard. When Ewing arrived in the courtyard, he saw nine girls in matching colored shirts,

some of which were decorated with what appeared to him to be gang insignia. Rodriguez told Ewing that a student had alerted Rodriguez that a fight was about to take place in the courtyard and that, upon entering the courtyard pursuant to that tip, Rodriguez saw the nine girls in matching colors standing near the entrance to the school building where he was told a fight was to occur. Rodriguez relayed to Ewing his perception of gang-related activity and described all that had happened in his presence, including the fact that several girls had "hurled" profanity at students attempting to enter the school, and a student passer-by had referred to the nine as a "gang" in Rodriguez's presence. More profanity was uttered in Ewing's presence. The students did not appear to respect Ewing's authority: One student said "we can wear what we want," and another turned her back on him and told the others he was a "liar."[12] Furthermore, Bowie High School had problems in the past with gang-related activity and students attempting to give the appearance of gang affiliation, particularly at the start of the school year. The school year was not yet one-week old at the time of the incident.

Under these circumstances, a reasonable school administrator could have believed he was facing a situation that "pose[d] a continuing danger to persons or property or an ongoing threat of disrupting the academic process." *Goss*, 419 U.S. 582. Consequently, a reasonable school administrator could have believed it was lawful – without permitting the girls to proceed to class that

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[12] These quotes come from the Plaintiffs' testimony. Record references are provided in the Statement of the Case, *supra*.

morning and without first providing them a hearing – to announce that each girl was to be removed for three days; assistant principals were to call the girls' parents and inform them of what occurred; and formal meetings with the parents were to be scheduled following the three-day removals.

Irrespective of whether the nine girls in the courtyard *in fact* "pose[d] a continuing danger to persons or property or an ongoing threat of disrupting the academic process," Principal Ewing reasonably could have believed he was facing such a situation. The contours of *Goss* were not then, and are not now, so clearly established that every reasonable school administrator in Principal Ewing's position would have known that his actions that morning were unlawful in light of clearly established law.

An example of a proper qualified immunity analysis under *Goss* appears in *Picozzi v. Sandalow*, 623 F. Supp. 1571 (E.D. Mich. 1986), *aff'd*, 827 F.2d 770 (6th Cir. 1987), *cert. denied*, 484 U.S. 1044 (1988). In that case, the district court first determined, as a matter of law, that *Goss* did not require a pre-deprivation hearing where a law school student injured in a dorm room fire later was suspected by police of setting that fire, and the Dean then conditioned the student's re-enrollment on his passing a police-administered polygraph test or establishing his innocence at an administrative hearing.[13] The court also

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[13] As the court explained:

> This case falls squarely within the *Goss* provision for situations not requiring a pre-suspension hearing. [The administrator's] first letter to Picozzi following the fire specifically grounded [the administrator's]

held, however, that even assuming the administrator violated the student's due process rights by failing to hold a pre-deprivation hearing, the administrator nonetheless was entitled to qualified immunity:

> In this case, [the administrator's] action was objectively reasonable because it did not violate a clearly established right of which a reasonable person would have known. Neither *Goss*, *Mathews* [*v. Eldridge*], nor any other federal law clearly requires a hearing *prior* to the preliminary action [the administrator] took in this case. He faced a situation calling for prompt action and requiring reliance on information supplied by other people, precisely the situation in which *Wood* [*v. Strickland*] calls for application of the qualified immunity doctrine.[14] *Wood*, 420 U.S. at 319, quoting *Scheuer* [*v. Rhodes*], 426 U.S. at 246 ("As with executive officers faced with instances of civil disobedience, school officials, confronted with student behavior causing or threatening disruption, also have an 'obvious need for prompt action, and decisions must be

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> actions in concern for the safety of the law school community. In an earlier memorandum addressed to the law school community, [the administrator] addressed a rising anxiety among the community's members over various incidents of violence, including the fire, within the community. Such anxiety disrupts academic calm. This is precisely the situation in which *Goss* permits suspension without a prior hearing.

623 F. Supp. at 1578 (footnote and citation omitted).

[14] *See supra* note 9 (discussing the continuing validity of *Wood*'s objective reasonableness prong in light of *Harlow*).

> made in reliance on factual information supplied by others.' ").

Id. at 1581 (emphasis added) (footnote omitted).

The Fifth Circuit, by contrast, deemed irrelevant both the information Ewing possessed and the circumstances as they reasonably could have been perceived by Ewing on the morning of August 26, 1994. Nor did the Fifth Circuit analyze whether a reasonable administrator in Principal Ewing's situation could have believed his conduct comported with clearly established law. Instead, the court acted as though *Goss* would permit only one result:

> Appellants emphasize that it was reasonable for Ewing to be concerned about the appearance and behavior of the students because he had heard that a gang fight was imminent. What is at issue here, however, is not the appellants' [sic] aims, but his means. While he was free to suspend the students *after* hearing their stories, *Goss unambiguously* required him to allow them to present those stories, and if he did not do so, he violated the students' due process rights.

App. A at 10 (emphasis added). *Goss*, however, imposes no "unambiguous" requirement that students always be permitted to tell their story *prior* to being disciplined. In holding that anything short of a pre-suspension hearing would violate due process in this case, the Fifth Circuit created new constitutional protections in the school context in a manner that directly conflicts with *Goss*.

Nor, for purposes of qualified immunity, should the Fifth Circuit have dismissed so readily Principal Ewing's

concerns about not only the imminence of a gang fight, but also the appearance of gang activity at Bowie High School. Gang violence, including violence by female gangs, is a widespread threat in America's public schools. Had Ewing returned the girls to class and held a hearing later that day prior to imposing discipline, he might have endangered other students and teachers and been responsible for bloodshed on campus. Furthermore, other students might have gotten the mistaken impression that rumblings of gang activity were not taken seriously at Bowie. Weighing the perceived threat of gang activity with the students' due process rights, Ewing struck a balance that was objectively reasonable under the circumstances: he imposed a three-day removal; told his assistant principals to call the girls' parents and inform them what occurred; and instructed the assistant principals to set up post-suspension conferences with the students and their parents. Reasonable school officials might differ over the correct balance to strike under those circumstances, but Ewing's response was not so unreasonable and patently unlawful as to deprive him of a qualified immunity defense. *See Malley*, 475 U.S. at 341 ("[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized.").

Furthermore, *Goss* was not the sole guidepost for determining the objective legal reasonableness of Ewing's actions on August 26, 1994. Ewing's conduct appears all the more objectively reasonable in light of Fifth Circuit precedent at the time. In *Sweet v. Childs*, 518 F.2d 320, 321 (5th Cir. 1975), the Fifth Circuit upheld a school's provision of post-suspension hearings to students who participated in a protest march. In denying Principal Ewing

qualified immunity, the Fifth Circuit distinguished *Sweet* as a case in which post-suspension hearings were adequate because "the students had left the school premises before the suspensions were announced, so no hearing could have been held on that day." *See* App. A at 9 n.4. It is doubtful that the Fifth Circuit intended to limit *Sweet* to its facts; however, even assuming that was the court's aim, no such limitation had yet occurred on the morning Principal Ewing made his decision. *See Harlow*, 457 U.S. at 818 (stating that qualified immunity considers "not only the currently applicable law, but whether that law was clearly established at the time an action occurred"). Furthermore, notwithstanding any implied limitation of *Sweet*, the Fifth Circuit did acknowledge that *Sweet* "reaffirms the proposition that pre-deprivation hearings *are not always required*." App. A at 9 n.4 (emphasis added). In light of *Sweet*, and the flexible parameters of *Goss*, a school administrator in Principal Ewing's position could have believed that an emergency three-day removal followed by a parent conference upon the student's return to school did not violate clearly established rights of which a reasonable school administrator would have known on the morning of August 26, 1994.

Finally, the Fifth Circuit's decision marks an unwarranted judicial intrusion into the education arena.

> It is not the role of federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. . . . [Section] 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school

> regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members and [section] 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.

Wood, 420 U.S. at 326. Even when constitutional violations occur, qualified immunity prohibits federal courts from second-guessing discretionary disciplinary action taken by school administrators who hold an objectively reasonable, albeit mistaken, belief that the conduct does not violate clearly established rights of which a reasonable school administrator would have known. *See, e.g., Anderson*, 483 U.S. at 640-41; *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986); *Mitchell*, 472 U.S. at 535; *Wood*, 420 U.S. at 319-22.. The Fifth Circuit, however, ignored the Court's admonitions in *Wood* regarding the limited role of federal courts in the school administration context and denied Principal Ewing qualified immunity under a misreading of *Goss* and a misapplication of *Harlow*'s objective legal reasonableness test.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that the Court grant the Petition for a Writ of Certiorari, because the Fifth Circuit's opinion reconfigures students' procedural due process rights in a manner that conflicts with *Goss v. Lopez*, impedes the ability of school officials to combat gang activity on school campuses, signals an alarming erosion of the qualified immunity defense in the context of school administration, and marks an impermissible intrusion of the federal courts into the educational arena.

Respectfully submitted,

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Dated: March 30, 1999

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50561

TED MEYER, Individually and as Next Friend for Carolyn Preciado, A Minor; ROSEMARY MEYER, Individually and as Next Friend for Carolyn Preciado, A Minor; HAROLD ROBBINS, Individually and as Next Friend for Linda Rosales, now known as Linda Quiroz, A Minor; LINDA ROBBINS, Individually and as Next Friend for Linda Rosales, now known as Linda Quiroz, A Minor; PEDRO R AGUIRRE, Individually and as Next Friend for Angelica Aguirre, A Minor; SYLVIA MARTINEZ, Individually and as Next Friend for Aglae Martinez, A Minor; JESSE MARTINEZ, Individually and as Next Friend for Aglae Martinez, A Minor; HERMINIA LARIOS, Parent of Sarah Ramirez; SARAH RAMIREZ

Plaintiffs-Appellees,

v.

AUSTIN INDEPENDENT SCHOOL DISTRICT; KENT EWING, Principal, Bowie High School

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Texas

(Filed Nov. 16, 1998)

Before KING, GARWOOD and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Students in a Travis County, Texas, high school alleged that school administrators illegally denied them procedural due process by suspending them for gang-related activity. The magistrate judge presiding by consent refused to grant summary judgment for the school principal on the basis of qualified immunity. Given our limited jurisdiction on this interlocutory appeal, we affirm.

I

Five minor students and their parents as next friends sued the Austin Independent School District, its board of trustees and school board, superintendent James H. Fox, Bowie High School, and Bowie principal and vice-principal Kent Ewing and Jorge Rodriguez. The complaint was filed in Texas state court and removed by the defendants. After threatening expulsion, the school had suspended the plaintiffs for three days each on the ground that their shirts, which were "maroonish or reddish" and allegedly contained gang insignia, indicated that they were engaging in gang-related activities. The students complained that they had not received procedural due process when they were suspended from school without a hearing, and also made complaints based on the First Amendment, substantive due process, and the Equal Protection Clause.

Defendants filed a motion to dismiss, based in part on the immunity doctrine of *Monell v. Department of Soc.*

Servs., 436 U.S. 658, 690-91 (1978). The parties consented to proceed before a magistrate judge, and the case was reassigned to him for all purposes.[1] The magistrate judge dismissed all claims other than the procedural due process claim, and dismissed the procedural due process claim as it related to Rodriguez in all capacities and Ewing in his official capacity. The AISD remained as a defendant only for the limited purpose of enabling the district court to grant the students' request for injunctive relief regarding certain AISD records should the court find that the principal violated the students' procedural due process rights.

Ewing and AISD filed a Rule 56 summary judgment motion. The school argued that the parents lacked standing to assert a due process claim and that there were informal "give and take" hearings between the students and the administrators that met the requirements of procedural due process. The magistrate judge, persuaded that the parents lacked standing, granted summary judgment on the due process claims, but denied the motion in all other respects. The magistrate judge found that there was a question of fact as to whether the interviews held with students and parents constituted a "hearing" in which students had been able to present "their side of the story" regarding the events at issue.

The district court did not make explicit factual findings, but assumed for the purpose of summary judgment

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[1] This appeal is thus before the court pursuant to 28 U.S.C. § 636(c)(3) (authorizing a direct appeal from a magistrate to the court of appeals). *See also Parker v. Collins*, 736 F.2d 313 (5th Cir. 1984).

the facts as set forth by the students. The students submitted affidavits telling similar stories. As they were arriving at school, Rodriguez or Ewing noticed their clothing and inquired as to why they were wearing "gang stuff." The administrators did not give the students a chance to answer the apparently rhetorical questions. Ewing told the students that they would not be allowed to return to Bowie, and a journalism teacher took pictures of the students and their clothing. At no time did any administrator ask the students to explain how they came to wear similarly colored clothing, although several students protested that they did not belong to a gang.

The students' parents were ultimately called, and though some argued at length with the principal, the school imposed three-day suspensions. Affidavits of the students and their parents assert that the students were not allowed to urge their side of the story. Some of the parents, however, volunteered that their children did not belong to gangs. After serving their suspensions, the students were given re-entry conferences, and they were then permitted to return to school.

Ewing and AISD appeal from the denial of summary judgment.

II

In *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), the Supreme Court held that "denial of a claim of qualified immunity to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *See also Coleman v. Houston Ind. Sch. Dist.*, 113

F.3d 528, 531 (5th Cir. 1997) (" 'Denial of summary judgment on the ground of qualified immunity is immediately appealable to the extent that the question on appeal is whether the undisputed facts amount to a violation of clearly established law.' ") (quoting *Kelly v. Foti*, 77 F.3d 819, 821 (5th Cir. 1996)).

The inquiry is a subtle one, because the Supreme Court has confined the *Mitchell* doctrine. A summary judgment determination based upon whether there is sufficient evidence to create a genuine issue of material fact, the Court has held, is not subject to immediate appeal. *See Hare v. City of Corinth*, 74 F.3d 633, 638 (5th Cir. 1996) (citing *Johnson v. Jones*, 515 U.S. 304, 313 (1995)). Under *Johnson*, this court "cannot review whether the evidence could support a finding that particular conduct occurred, but can take, as given, the facts that the district court assumed when it denied summary judgment and determine whether those facts state a claim under clearly established law." *Southard v. Texas Bd. of Criminal Justice*, 114 F.3d 539, 548 (5th Cir. 1997) (internal quotation marks and citations omitted); *see also Nerren v. Livingston Police Dep't*, 86 F.3d 469, 472 (5th Cir. 1996).

In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Supreme Court sought to explain the distinction:

> *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not

> truly "separable" from the plaintiff's claim, and hence there is no "final decision". . . . Johnson reaffirmed that summary-judgment determinations are appealable when they resolve a dispute concerning an "abstract issu[e] of law" relating to qualified immunity, . . . typically, the issue whether the federal right allegedly infringed was "clearly established."

Id. at 313.

In *Colston v. Barnhart*, 146 F.3d 282 (5th Cir. 1998), we applied the Supreme Court test and distinguished between genuine issues of fact and material issues of fact. *See id.* at 284. We cannot consider a claim "that the district court erroneously concluded that a genuine issue of fact exists." *Id.* Therefore, in the instant case, we could not reexamine the plaintiffs' affidavits and determine that these affidavits did not present sufficient evidence that the administrators failed to give them a chance to tell their side of the story.[2] At the same time, we can consider

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[2] A caveat is that "where the district court does not identify those factual issues as to which it believes genuine disputes remain, an appellate court is permitted to go behind the district court's determination and conduct an analysis of the summary judgment record to determine what issues of fact the district court probably considered genuine." *Id.* at 285. The magistrate judge here held that there was a genuine issue of fact as to whether the students had been given an opportunity to tell their side of the story. While the record does not make clear whether the magistrate judge concluded that administrators' meetings with parents can be adequate substitutes for meetings with the students provided the parents relay the students' stories, our best assessment is that the magistrate judge also found a genuine issue of fact as to whether the parents had been able to present their children's stories.

a claim "that a material issue of fact exists," *id.*, i.e. that the legal conclusion the district court drew was incorrect. Thus, for example, we would have jurisdiction to hold that meetings with parents always provide adequate due process for children, or to hold that the law does not require school officials to give students a chance to tell their side of the story. Our inquiry thus narrows to the straits of these guidelines.

III

In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court required that before a school suspend a student, the student be "given an opportunity to explain his version of the facts at this discussion" by being "told what he is accused of doing and what the basis of the accusation is." *Id.* at 582. The Court further noted that while such discussion "will add little to the fact-finding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge . . . the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context." *Id.* at 584.

The appellants seize on this latter language, arguing that the disciplinarian here witnessed the conduct. But the relevant "conduct" here is belonging to a gang, and the wearing of clothes is merely evidence of that conduct.[3] Moreover, this focus does not confront the

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[3] Appellants note that Bowie had adopted a policy prohibiting the wearing of any clothing in any manner other than that for which it was designed, and stating that the school

Supreme Court's common sense admonition that "things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context." *Id.* We do not read *Goss* to exempt conduct witnessed by the school official, and we are unpersuaded that the students' assumed inability to tell their stories was here immaterial.

We need not decide here whether a meeting with a parent is necessarily a sufficient substitute for a meeting between an administrator and a student. We recognize that *Goss* speaks immediately to the opportunity of students to defend themselves, not an opportunity for parents to defend their children. Under some circumstances, a parent may serve as an acceptable surrogate for a student, whose story is told through the parent. As long as the student's story is told, either directly or through a reliable intermediary standing *in loco parentis* to the child, the requirements of *Goss* are met. Even given the parent's power to act as a surrogate for a child where the parent is given the opportunity to tell the child's side of the story, we cannot disturb the district court's factual conclusion that there is a genuine issue as to whether the students were able to tell their side of the story, including the parents in the mix. Our limited jurisdiction also means

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would take action if a student's appearance conflicted with the safety, health, behavior, or learning environment within the school. The policy, however, notably does not ban "reddish or maroonish" clothing. Thus, the school officials did not directly witness prohibited conduct, as would be the case if, for example, they caught a student red-handed violating a weapons policy by smuggling a gun into the school.

that we cannot disturb this conclusion by considering whether the re-entry conferences were adequate post-deprivation hearings at which the students were given a chance to tell their side of the story.[4]

The appellants contend in the alternative that the administrators acted as reasonable public officials would and thus are entitled to qualified immunity. Reasonable public officials, however, could not differ on whether allowing the students to tell their side of the story was required. To overcome the defense of qualified immunity, a plaintiff must show that the contours of the constitutional right were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "Where reasonable public officials could differ on the lawfulness of the official's actions, the official is entitled to qualified immunity." *Cantu v. Rocha*, 77 F.3d 795, 806 (5th Cir. 1996).

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[4] The *Goss* Court specified that the hearing should be "*preferably* prior to the suspension," 419 U.S. at 584, indicating that a hearing subsequent to the suspension might be appropriate. We have recognized before that post-suspension hearings may afford students adequate procedural due process. In *Sweet v. Childs*, 518 F.2d 320, 321 (5th Cir. 1975), we held, "The post-suspension student-parent conferences sufficed as informal 'give-and-take' sessions in which the students could air their views as to the events leading up to the suspensions." That case differed from this one in that the students had left the school premises before the suspensions were announced, so no hearing could have been held on that day. The case nonetheless reaffirms the proposition that predeprivation hearings are not always required.

Appellants emphasize that it was reasonable for Ewing to be concerned about the appearance and behavior of the students, because he had heard that a gang fight was imminent. What is at issue here, however, is not the appellants' aims, but his means. While he was free to suspend the students after hearing their stories, *Goss* unambiguously required him to allow them to present those stories, and if he did not do so, he violated the students' due process rights.

We hold that given the district court's finding that there was insufficient summary judgment evidence to force the conclusion that the students were able to tell their side of the story, we cannot upset the summary judgment on the qualified immunity issue. Of course, Principal Ewing still has a qualified immunity defense available to him at trial. He thus may show that the students, either personally or through their parents, were able to tell their side of the story.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50561

TED MEYER, Individually and as Next Friend for Carolyn Preciado, A Minor; ROSEMARY MEYER, Individually and as Next Friend for Carolyn Preciado, A Minor; HAROLD ROBBINS, Individually and as Next Friend for Linda Rosales, now known as Linda Quiroz, A Minor; LINDA ROBBINS, Individually and as Next Friend for Linda Rosales, now known as Linda Quiroz, A Minor; PEDRO R AGUIRRE, Individually and as Next Friend for Angelica Aguirre, A Minor; SYLVIA MARTINEZ, Individually and as Next Friend for Aglae Martinez, A Minor; JESSE MARTINEZ, Individually and as Next Friend for Aglae Martinez, A Minor; HERMINIA LARIOS, Parent of Sarah Ramirez; SARAH RAMIREZ

Plaintiffs-Appellees,

v.

AUSTIN INDEPENDENT SCHOOL DISTRICT;
KENT EWING, Principal, Bowie High School

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Texas

(Filed Feb. 10, 1999)

ON PETITION FOR REHEARING

(Opinion November 16, 1998, 5th Cir. 1998 ___ F.3d ___)

Before KING, Chief Judge, GARWOOD and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

The appellants seek rehearing, contending we held that a principal would "lose qualified immunity simply because he mistakenly assumes that a parent's defense of his or her child reflects the child's side of the story," and that "if a school administrator gives a parent an opportunity to defend his or her child, but later the child contends he or she would have told a different story, that school administrator will be personally liable for money damages." We did not hold that. To the contrary, we held that procedural due process is satisfied where there is a meaningful opportunity to tell the child's side of the story. Of course, an administrator's speaking with a parent will not create a meaningful opportunity in every case. Thus, for example, here plaintiffs contend that various administrators merely informed the parents of what had happened and the discipline *already* imposed and gave the parents no meaningful opportunity to explain or seek a different result. Whether such a meaningful opportunity existed here we do not assess. This we leave to the district court, as we must given the limited nature of our interlocutory review.

PETITION FOR REHEARING DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

TED MEYER ET AL.

V.

AUSTIN INDEPENDENT SCHOOL DISTRICT, ET AL.

CAUSE NO. A-96-CA-625 ADA

ORDER

(Filed Jun. 13, 1997)

Came on for consideration this date the Motion of Defendants' Austin Independent School District ("AISD"), and Kent Ewing ("Ewing") in his individual capacity as Principal of Bowie High School respectively ("Defendants") for Summary Judgement filed on April 28, 1997 (Clerk's Docket No. 37). The Plaintiffs filed their Response on May 27, 1997 (Clerk's Docket No. 43). The Defendants filed a letter brief with the Court on June 6, 1997. The Court conducted a Motions Hearing on June 4, 1997.

The Plaintiffs ask for a declaratory judgment as well as injunctive relief and nominal damages for the alleged violation of the students' and parents' right to procedural due process. The Plaintiffs bring this case under the auspices of 42 U.S.C. § 1983.

I. Factual Background

The Plaintiffs, high school students and their parents, allege generally, that they were among nine students

wearing maroon colored shirts to an Austin high school when their rights were violated by Defendants because they were: 1) stopped as they entered school one day; 2) told that they were engaging in gang related activity; 3) photographed individually and together; and 4) removed and suspended from school for a three day period without sufficient procedural due process. Plaintiffs allege that Defendant Ewing informed the students that when they returned to school they were prohibited from assembling in groups of more than three students and that they were prohibited from wearing same colored clothing on the same day. Defendant Ewing also warned them of future discipline if they violated these rules. While the Plaintiffs concede that they all wore similar colored shirts to school on the day in question, they contend that they are not and were not members of any gang and were not disruptive on the day in question. Plaintiffs allege that they were not provided with sufficient procedural due process under the Fourteenth Amendment before they were suspended.

II. Defendants' Motion

Defendants contend that the "parent" Plaintiffs lack standing to assert a due process claim on their own behalf. Defendants contend that the informal "give and take" sessions between the student Plaintiffs (and/or their parents) and school administrators met the procedural due process requirements for short term suspensions. Based on the foregoing, Defendant Ewing argues that he is protected from suit and liability under the doctrine of qualified immunity.

III. Analysis

A. Standard of Review

Summary judgment should be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, establish that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. *Wilson v. Secretary, Dept. Of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995). Under Rule 56(c), the party moving for summary judgment bears the initial burden of informing the district court of the basis for its motion and for identifying the portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986). *Norman v. Apache Corp.*, 19 F.3d 1017, 1023 (5th Cir. 1994). In *Celotex*, the Supreme Court wrote:

> In our view, the plain language of Rule 56(b) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. at 322-23. In *Celotex*, the Supreme Court further instructed that the "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the

Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Id.* at 327.

When ruling on summary judgment motions, courts credit the evidence of the nonmovant and draw all justifiable inferences in his favor. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2513 (1986). However, mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment; the party defending against a motion for summary judgment cannot defeat a motion for summary judgment unless it provides specific facts that show the case presents a genuine issue of material fact, such that a jury might return a verdict in its favor. *Id.* at 2510. If the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S.Ct. 1348, 1355-56 (1986). The burden on the non-moving party is to do more than simply establish that there is some metaphysical doubt as to the material facts. *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1355-56. *Meadowbrook Home for Children v. Gunn*, 81 F.3d 521, 533 (5th Cir. 1996), citing, *Burfield v. Brown, Moore & Flint, Inc.*, 51 F.3d 583, 588 (5th Cir. 1995). This means that a nonmovant must identify specific evidence in the record and articulate the precise manner in which that evidence supports its claims. *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 195 (1994). Conclusory statements, unsupported by specific facts, presented in affidavits opposing the motion for summary judgment are insufficient to defeat a proper motion for summary

judgment. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177 (1990).

B. The Parents' Standing to Assert a Due Process Claim

Defendants contend that the "parent" Plaintiffs lack standing to assert a due process claim on their own behalf. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992), the United States Supreme Court established the test for Article III standing. Article III, § 2 of the Constitution limits the jurisdiction of federal courts to "Cases and Controversies." Standing to sue or defend is an aspect of the case or controversy requirement. *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1067 (1997). The constitutional minimum for standing is comprised of three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not conjectural or hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be "likely," as opposed to "speculative," that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61, 112 S.Ct. at 2136 (footnotes and citations omitted). *See also, Bennett v. Spear*, 117 S.Ct. 1154, 1163 (1997). The *Lujan* "injury-in-fact" test consists of two parts:

1. The invasion of a legally protected interest and the criteria of concreteness and particularity; and
2. Actuality or imminence.

If a plaintiff fails to meet the requirements of both sections, they have failed to meet the constitutional minimum of standing. To summarize, to survive a challenge of standing, a plaintiff must establish that he had a legally protected interest that had been invaded. A failure to meet this challenge is fatal to a plaintiff's ability to pursue his claim.

The Defendants contend that the "parent" Plaintiffs have no standing to assert procedural due process claims against him in their individual capacities because they have not, as a matter of law, suffered any legal injury. Defendants rely on *Zehner v. Central Berkshire Regional School District*, 921 F. Supp. 850, (D. Mass. 1995), for the proposition that "when a student is suspended, it is the student who is entitled to due process because it is the student – not his parents – who has a right to a free public education." The Court has carefully reviewed the Defendants' response, and finds that the Plaintiffs have not responded to the Defendants' argument with respect to this issue. In fact, Plaintiffs stipulated to this issue during the Motions Hearing before the Court. Therefore, the Court GRANTS the Motion for Summary Judgment with respect to this issue.

C. Qualified Immunity & the Procedural Due Process Claim

Plaintiffs allege that they did not receive sufficient procedural due process before they were suspended from

school. Defendants contend that the Student Plaintiffs received all of the process that they were due before they were removed from school on August 26, 1994. Therefore, Defendants argue that Defendant Ewing is entitled to qualified immunity.

Qualified immunity shields government officials performing discretionary functions from individual liability for civil damages "insofar as their conduct does not violate clearly established rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982). Courts review a claim of qualified immunity under a two-step process. First, we determine whether the plaintiff has alleged the violation of a "clearly established constitutional right" under currently applicable constitutional standards. If so, we consider whether the defendant's conduct was nevertheless "objectively reasonable." *Nerren v. Livingston Police Dep't*, 86 F.3d 469, 473 (5th Cir. 1996).

In *Siegert v. Gilley*, 111 S.Ct. 1789, 1792-93 (1991), the Court emphasized that the threshold inquiry in a qualified immunity case is whether the plaintiff has sufficiently alleged the violation of a clearly established constitutional right. Students who face suspension form [sic] school possess property rights under the due process clause of the Fourteenth Amendment. *Goss v. Lopez*, 95 S.Ct. 729 (1975). In *Goss*, the United States Supreme Court set forth the necessary procedural due process requirements to be met before the imposition of a suspension of ten days or less from school:

> due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges

> against him, and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

Id. at 739-40.

The Supreme Court emphasized that the notice need not be given in a formal setting. For example the Court noted that "[t]here need be no delay between the time 'notice' is given and the time of the hearing" and that rudimentary procedures such as an "informal give-and-take between student and disciplinarian" will satisfy the procedural due process requirements for a suspension lasting for ten days or less. *Id.* at 740-41.

In the instant case, Plaintiffs deny that they received an informal give-and-take hearing. Plaintiffs contend that they were not given an opportunity to present their side of the story as is required under *Goss*. Defendants contend that the Plaintiffs received: (1) an informal hearing immediately after the incident; (2) another hearing with the parents when they arrived at the school to pick the students up; and (3) a post-deprivation hearing three days after the suspension. Despite Defendants' arguments, the record before the Court does not resolve the factual dispute in regard to whether the students were allowed to present their side of the story to the school officials during the informal hearings as is required under the holding in *Goss*. Therefore, the Court finds that there is a genuine issue of material fact as to whether Plaintiffs' due process rights were violated which precludes granting Defendants' Motion for Summary Judgment as to the issue of qualified immunity.

Summary

After careful consideration of Defendants' Motion and Plaintiffs' Response, accompanying affidavits, the relevant case law, and the entire file, the Court finds that Defendants' Motion for Summary Judgement is HEREBY GRANTED IN PART and DENIED IN PART. Defendants' Motion for Summary Judgement with respect to the Standing issue is HEREBY GRANTED. Defendants' Motion with respect to the procedural due process issue is HEREBY DENIED.

SIGNED this the 12th day of June, 1997, at Austin, Texas.

/s/ Alan D. Albright
ALAN D. ALBRIGHT
UNITED STATES
MAGISTRATE JUDGE

APPENDIX D

****

ORIGINAL ORAL DEPOSITION
OF
GREGORY KENT EWING

****

OCTOBER 22, 1996

* * *

[p. 6] Q. Okay. Tell me what you recall about that incident.

A. How much detail do you want me to go into?

Q. As much as you can.

A. Okay. It was right before the day was to start, the first bell had already sounded. The students were supposed to be in class. I was in the halls. A student came to me and told me that I needed to go to the courtyard, it looks like there was going to be a disruption. I started in that direction and heard a call on the radio that we needed to go to the courtyard. I [p. 7] entered and there were nine students standing in front of the building in the courtyard.

* * *

Q. What did they say the disruption was going – what kind of disruption?

A. Just what they've – I've just repeated to you.

Q. The student?

A. Exactly what they told me.

Q. The student used the word "disruption"?

A. Yes, sir.

Q. Did they say anything more descriptive than that?

A. No, sir.

Q. Did they say what the people in the courtyard were doing?

A. No, sir.

* * *

[p. 10] A. Let me answer that like this. There were students who pretended to be part of gangs. There were students who had tagged parts of the building with their gang tag or their gang sign at times. We have had situations with groups having conflict related to gang activities or want-to-be gang activities that we had mediated in the past. It was early in the year. It seems that at the beginning of each year there are some students who want to present the appearance of being gang associated.

Q. Whether they are or not?

A. That's correct.

Q. Had you had any students – how long had school been going on August the 26th; a couple of weeks?

A. I would have to refer back to a calendar. It –

Q. Just an estimate. I'm not –

A. Probably a week.

Q. A week? Okay. Had you had any reports of gang activity in school that year?

A. I can't remember.

* * *

[p. 14] Q. And you said you – you said, "Turn your shirts inside out"?

A. That's correct.

Q. You say you gave them that option?

A. Yes, sir.

Q. That they could have turned their shirts inside out and then stayed at school that day?

A. Yes, sir. Or changed shirts entirely. We would have provided shirts for that.

Q. Turning them inside out wouldn't have done much good, would it?

A. Well, it would have covered up the gang tags.

Q. What were the gang tags that were on the shirts?

A. Q-VO La Rosa.

Q. Was there a gang that you had heard of called La Rosa?

A. No, sir.

Q. And Q-VO, what does that mean?

A. I'm not sure.

Q. Is it a gang sign or symbol or –

A. Yes, sir.

Q. Do you know what gang or – that it's referring to?

A. Q-VO.

* * *

[p. 34] Q. Did they try to explain anything about the significance of the words or the letters – I mean, Q and VO?

A. It spoke to something about that was their – their tag. They could wear that if they wished.

Q. So they were saying this was a symbol that they wanted to wear – or at least that – there was only two that had that symbol?

A. That's correct.

Q. And they said we think we can wear this if we want to, or some words to that effect?

A. Yes.

* * *

[p. 35] Q. What did you decide to do as a result of this?

A. I instructed the administrators to remove them from the campus, set up parent conferences so we could discuss the situation, and take whatever future action was necessary to prevent it from happening again.

Q. So it was a – was that the same punishment for all the girls?

A. Yes, sir.

Q. They were going to get – was it a three-day suspension, I think.

A. I think we did an Emergency Removal.

Q. What's the difference between a – I may not know the right terminology. What is "an Emergency Removal," for [p. 36] the record?

A. Probably referred to the discipline policy for these specific – but basically an Emergency Removal is a disruptive situation where a student is removed from school until a situation can be brought under control and the appropriate actions decided. How can I put this? Look at all the ramifications, exactly what happened, what needs to happen, if anything, to insure the safety of the – the campus and the students – excuse me, the campus and students. Not only those students involved, but other students that attend the school as well is what usually Emergency removal is designed for.

Q. And you felt that was the appropriate sanction in this instance?

A. Yes, sir.

Q. What were the rules that the girls had violated, the rules of the school?

A. Primarily with the dress code and conducting themselves in a manner that appeared to be disruptive to the educational environment and intimidating to other students.

* * *

[p. 37] Q. (By Mr. Grigson) What part of the dress code was violated?

A. The personal appearance section. I'll just read that to you.

Q. Okay.

A. The entire –

Q. Just read me the part that you think that the girls were in violation of.

A. "The school will become involved only if the student's appearance conflicts with the safety, health, behavior or learning environment within the school. Vulgar and obscene clothing is not permitted. Clothing worn in any manner other than for which it was designed is not permitted."

Q. Okay. Was there – any of the clothing worn in some other manner than it was designed?

A. Well, it was not designed with tags on it.

Q. With the Q and the VO?

A. That's correct.

[p. 38] Q. And the –

A. And the La Rosa Rosales on it; that's correct.

Q. All right. That was one of the violations. Was there anything else in that code they violated?

A. Well, it appears to conflict with safety and behavior of the learning environment.

Q. Did you think that there was some danger by the way that they were dressed and what they were doing out in the courtyard?

A. Yes, sir.

Q. What was the danger?

A. The danger to other students if, in fact, this was a gang and their purpose was to intimidate or injure another student who is not part of their group.

* * *

[p. 54] Q. Right. And did you talk to any of the students about other sanctions that could be imposed as opposed to a three-day removal?

A. Well, initially there was no three-day removal at all.

Q. What do you mean, "Initially there was no three-day removal"?

A. Initially we just wanted the girls to settle down, either turn their shirts inside out, change shirts, and go to class.

Q. And then when they said "No, we don't want to do that," or whatever they said, did –

A. Well, yeah, it was something similar to that.

Q. And then that's when you said it's a three-day removal?

A. Well, no, sir. After it continued to escalate and the abusive language and uncooperative attitude of the students, it escalated to that point; yes, sir.

Q. What did you tell the administrators to do when the girls came back to school?

A. Have a re-entry conference with them and the parents.

* * *

APPENDIX E

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ORIGINAL ORAL DEPOSITION

OF

JORGE LUIS RODRIGUEZ

****

OCTOBER 22, 1996

* * *

[p. 8] Q. Okay. Tell me when you first heard anything about this incident.

A. Between the hour of 8:45 and 9:45, the bell – school bell rung. And I was walking downstairs between E wing and F wing. I was walking towards F wing. And as I was walking towards F wing, a student approached me. He appeared to be somewhat hurried in his manner that he approached me. And the statement that he made, Mr. Grigson, was something to the effect of, "There is going to be a fight. Mr. Rodriguez, there's going to be a fight." I said, "What?" "There is going to be a fight." I said, "Where?" And he said, "Over there by A wing."

So I walked with the student. I said, "Where?" And he said – I said, "Where? I don't see anything in A wing." And the student said – stated, and points and said, "No, there." And he pointed in the direction of the courtyard and I could see what he was referring to. There was a group.

* * *

[p. 9] Q. All right. Then you're saying that the student pointed toward the courtyard?

A. That is correct.

Q. And then you went – what did you see when you looked toward the courtyard?

A. He pointed toward the courtyard in the direction of some students. And when I directed my vision, I saw students who were wearing the – the tops were similar in color. It was a maroon – similar to maroon in color. And I witnessed two students who were saying something to passers by, students who were passing by to class. That the students who were wearing the maroon color were stationary. They were not moving. The passers by were literally walking towards class because the bell had rung for them – for them to go to first period class. And as I approached, I saw and heard one of the students expressing a lot of profanity to students who were passing by. Mr. Grigson, I also heard and saw another student make some remarks that were loud but I – I can't recall what it was [p. 10] because the first student was very, very loud and she was using profanity.

Q. Do you remember who the first student was?

A. I believe that student is not here this morning, yes, sir.

Q. Was the student one of the five persons that's in this lawsuit?

A. May I see the list, sir, please? No, sir.

Q. Okay. Tell me what you remember that any of these five students were doing when you approached the courtyard?

A. All the students were together. The young lady who was being the loudest and using profanity was also making motions with her hands. Another student who was also making comments and loud comments – Mr. Grigson, I don't recall whom it was, were making comments. The other girls directed – or made comments – but I don't recall what they stated, some of the other girls who were present who are on this list.

* * *

[p. 11] Q. Okay. And so one student was being loud and profane. Others, you say, were making comments but you don't remember what?

A. That is correct.

Q. All right. What happened – what happened after that?

A. I approached the group and I don't recall the exact words that I made to the students, but I came – I positioned myself in between the group of – I suppose it was nine students, and the passers by and I called Mr. Ewing on the radio. And – and I stated to him I was going to need some assistance in the courtyard. And like five to ten seconds after that, Mr. Grigson, he was there; he arrived. Apparently he had already been told about the incident and was in route.

MR. COLE: Just to clarify for the record. You were testifying that Mr. Ewing arrived. You said Mr. Grigson arrived and I understood what you meant by that.

MR. GRIGSON: I – I understood and the record may – we'll change it if it's not clear.

MR. COLE: Okay.

Q. (By Mr. Grigson) So did you have any discussion [p. 12] with Mr. Ewing when he arrived about –

A. When Mr. Ewing arrived?

Q. About what was happening?

A. When Mr. Ewing arrived, I told him that there was a disturbance, that some of the students in the group were using profanity. And, Mr. Grigson, I remember seeing some of the identification on the T-shirts, which led me to believe that it could possibly be gang related. And I – and I mentioned to him that they were similar in color. I think that was obvious to him. I can't recall that I said anything else.

Q. What did you tell him about the disturbance?

A. I told him that there had been a lot of use of profanity by two of the students, one in particular. And that the – the comments or profanity had been directed at passers by who were going to class.

* * *

[p. 13] Q. Well, it's not phrased very well. Did you tell Mr. Ewing that you saw anything that indicated that a fight was about to occur?

A. Mr. Grigson, I stated to Mr. Ewing that I was afraid that a fight was going to occur because one of the students was very expressive in her body language and [p. 14] because she was hurling very severe profanity at students. Yes, sir, I believe I did say that.

Q. Okay. And is the student that you're referring to one of the persons that's mentioned in the top part of this lawsuit?

A. No, sir.

Q. Is this student that you're referring to the one that got taken away by the police that day?

A. Yes, sir.

Q. Okay. All right. And for the record, one of the nine children was taken away by the police on that day, right? Basically arrested?

A. Yes, sir, that's my understanding.

* * *

[p. 15] Q. What did you do when you first got on the scene to try to isolate the one girl that was using the profane and very loud type language?

A. The first thing that I did was to try to come between her and the students that she was with – it – and the passers by. That was the first thing that I did.

Q. And then after that, what did you do?

A. Then after that, sir, the immediate thing was to try to identify who the other party was. The disturbance was very loud, and I could identify one party. I couldn't identify the other party because the profanity and the [p. 16] comments that were being made and directed at the passers by were not at one specific person. They – the passers by were not stationary. They were walking to class and they were walking in different directions because different students were going to different classes.

However, the nine students were stationary. And the two students – but the one in particular who was hurling – who was using and directing the greatest profanity, was the one that was closest to the passers by.

Q. So you stood between her and the passers by?

A. I stood between, her, the other eight students, and the passers by; that is correct.

Q. And did she stop use the profanity when you were standing between her and the other students?

A. Mr. Grigson, she calmed down and continued to make comments. But at the moment that I arrived, she stopped using profanity. At the moment that I arrived and came between her, she stopped using profanity.

Q. Where the other eight girls using profanity or doing anything that was causing a disturbance in your opinion?

A. I recall two other students having used profanity. That student to whom you referred who was arrested – Mr. Grigson, I just cannot recall who the other student was beside her that was also using profanity. And [p. 17] after Mr. Ewing arrived, one of the students that's named in this lawsuit was also using profanity.

Q. Which one was the one in the lawsuit?

A. Aglae Martinez used profanity.

Q. After he arrived?

A. Yes, sir.

* * *

Q. Okay. You said that there was this one student

that you heard yelling and being very profane with the passers by, or it seemed – what was her – were her comments directed toward the passers by; could you tell that?

A. Yes, sir.

Q. They were?

A. Yes, sir.

Q. Did you see any comments made by – or hear any comments made by the other eight students directed toward [p. 18] passers by?

A. I heard one of the other eight students make direct comments and I heard other comments by the students, but I – I – the other seven students then, but I can't recall if they were being made at the passers by or to whom they were made. No, sir, I don't recall.

* * *

[p. 22] Q. You told us earlier that Mr. Ewing arrived within a matter of seconds, or something like that, after you did at the scene; is that right?

A. That is how I recall it, yes, sir.

* * *

[p. 23] Q. What did you observe after he arrived? Can you just tell us what happened after that.

A. Mr. Ewing said something like, "What's the problem?" – inquiring from me. And I stated to him that we had had a disturbance involving profanity and what I described earlier. And that he – he talked to the students.

Q. What were the students doing then when he was talking to them?

A. As Mr. Ewing started to speak, one of the students started using profanity.

Q. What it the same one that ultimately got arrested?

A. Yes, sir.

Q. Not one of the people that's involved in this lawsuit?

A. Not that I recall, no, sir.

Q. Okay. And then were any of the other eight using profanity as Mr. Ewing was trying to speak to them?

A. While Mr. Ewing was talking to one of the students, I recall Aglae Martinez using profanity. However, she did not direct it at Mr. Ewing. She was highly agitated and just used profanity to express herself, I suppose.

* * *